

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MOUNTAIN STAR COMPANY, INC. :
for Redetermination of a Deficiency or for Refund of :
Corporation Franchise Tax under Article 9-A of the Tax :
Law for the Period June 1, 1998 through May 31, 2002. :

In the Matter of the Petition :
of :
MOUNTAIN STAR COMPANY, INC. :
For Revision of a Determination or for Refund of :
Tax on Cigarettes and Tobacco Products under :
Article 20 of the Tax Law for the Period September :
1, 1999 through July 31, 2002. :

ORDER
DTA NOS. 820630, 820631
AND 820632

In the Matter of the Petition :
of :
MOUNTAIN STAR COMPANY, INC. :
For Revision of a Determination or for Refund of :
Sales and Use Taxes under Articles 28 and 29 of the :
Tax Law for the Period September 1, 1999 through :
May 31, 2002. :

Petitioner, Mountain Star Company, Inc., 412 Hillside Avenue, New Hyde Park, New York
11040, filed a petition for redetermination of a deficiency or for refund of corporation franchise
tax under Article 9-A of the Tax Law for the period June 1, 1998 through May 31, 2002; a

petition for revision of a determination or for refund of tax on cigarettes and tobacco products under Article 20 of the Tax Law for the period September 1, 1999 through July 31, 2002; and a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1999 through May 31, 2002.

Petitioner, by its representative, Peter J. Murphy, Esq., filed a motion on December 5, 2005 for an order precluding the Division of Taxation from offering particulars at hearing in respect of matters which petitioner has demanded particularization. Petitioner submitted an affirmation and annexed exhibits, in support of its motion. On December 21, 2005, the Division of Taxation filed a Response to Petitioner's Motion for Preclusion, with attached exhibits. Pursuant to 20 NYCRR 3000.5(d) and 3000.6, the 90-day period for issuance of this order commenced on December 21, 2005. Based upon the motion papers and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Thomas C. Sacca, Administrative Law Judge, renders the following order.

FINDINGS OF FACT

1. Petitioner commenced this proceeding by filing three petitions with the Division of Tax Appeals on December 17, 2004. The petitions were filed in protest of notices of deficiency (L-022558749 and L-022558750) which asserted, in the aggregate, \$39,927.00 in additional corporation franchise tax due, plus penalty and interest, for the period June 1, 1998 through May 31, 2002; Notice of Determination (L-022529509) which asserted \$84,029.27 in additional sales and use taxes due, plus penalty and interest, for the period September 1, 1999 through July 31, 2002; and Notice of Determination (L-022529602) which asserted \$2,933.51 in additional tax on cigarettes and tobacco products, plus penalty and interest, for the period September 1, 1999 through May 31, 2002. Before filing its petition, petitioner filed three requests for conciliation

conference with the Division of Taxation's Bureau of Conciliation and Mediation Services.

Following a conciliation conference, the Bureau of Conciliation and Mediation Services issued three conciliation orders dated April 15, 2005, which sustained the statutory notices at issue.

2. The Division of Taxation ("Division") filed its answer to the petitions on September 22, 2005.

3. On October 19, 2005, petitioner served a demand for a bill of particulars on the Division.

4. Petitioner's demand for a bill of particulars requests, in relevant part, as follows:

With respect to the allegation in Paragraph 6 of the Answer of the Division of Taxation that alleges that the Division "obtained information about the purchases made by the corporation during the audit period from the petitioner's suppliers and estimated petitioner's taxable sales by marking up such purchases," Petitioner herein demands from the Division of Taxation the following:

a. A listing of each and every invoice obtained from petitioner's suppliers for the subject audit period that was used to estimate Petitioner's sales, including, but not limited to, the date, and number of each invoice and the dollar value of each invoice.

b. The name of the suppliers contacted.

c. The total dollar value amount of each of such purchases used to estimate sales, including the amount of purchases for each month of the audit period.

5. The Division responded by letter dated November 7, 2005 to petitioner's demand for a bill of particulars, in relevant part, as follows:

a. The supplier information came from (1) a monthly list of petitioner's total purchases for the period January 1999 to April 2002 provided directly by a supplier and (2) from petitioner's own records.

b. Center Candy, Inc. was the only third party supplier contacted that provided information used in auditing petitioner's sales and use tax liability.

c. See print out provided to the Division from Center Candy as Attachment # 1.

Attachment #1 indicated petitioner's total purchases by month from Center Candy, Inc., for the years 1999, 2000, 2001 and the first four months of 2002.

6. As part of its motion, petitioner seeks the invoice numbers, invoice dates and amounts that make up the monthly totals in Attachment #1 of the Division's bill of particulars.

CONCLUSIONS OF LAW

A. The Tax Appeals Tribunal Rules of Practice and Procedure permit the use of a bill of particulars in proceedings in the Division of Tax Appeals. Specifically, section 3000.6(a) of the Rules provides as follows:

(1) After all pleadings have been served, a party may wish the adverse party to supply further details of the allegations in a pleading to prevent surprise at the hearing and to limit the scope of the proof. For this purpose, a party may serve written notice on the adverse party demanding a bill of particulars within 30 days from the date on which the last pleading was served.

(2) The written demand for a bill of particulars must state the items concerning which such particulars are desired. If the party upon whom such demand is served is unwilling to give such particulars, he or she may, in writing to the supervising administrative law judge, make a motion to the tribunal to vacate or modify such demand within 20 days after receipt thereof. The motion to vacate or modify should be supported by papers which specify clearly the objections and the grounds for objection. If no such motion is made, the bill of particulars demanded shall be served within 30 days after the demand, unless the administrative law judge designated by the tribunal shall direct otherwise.

(3) In the event a party fails to furnish a bill of particulars, the administrative law judge designated by the tribunal may, upon motion, issue an order precluding the party from giving evidence at the hearing of items of which particulars have not been delivered. A motion for such relief shall be made within 30 days of the expiration of the date specified for compliance with the request.

(4) Where a bill of particulars is regarded as defective by the party upon whom it is served, the administrative law judge designated by the tribunal may, upon notice, make an order of preclusion or direct the service of a further bill. In the absence of special circumstances, a motion for such relief shall be made within 30 days after the receipt of the bill claimed to be insufficient.

(5) A preclusion order may provide that it will be effective unless a proper bill is served within a specified time.

B. As noted above, the Rules provide that a party may serve a demand for a bill of particulars upon an adverse party in order “to prevent surprise at the hearing and to limit the scope of the proof”(20 NYCRR 3000.6[a][1]). Generally, under the CPLR, a party need particularize only those matters upon which it has the burden of proof (*see, Holland v. St. Paul Fire & Marine Ins. Co.*, 101 AD2d 625, 475 NYS2d 156, 157). In proceedings in the Division of Tax Appeals a presumption of correctness attaches to a notice of deficiency and the petitioner bears the burden of overcoming that presumption (*see, e.g., Matter of Estate of Gucci*, Tax Appeals Tribunal, July 10, 1997, citing *Matter of Atlantic & Hudson*, Tax Appeals Tribunal, January 30, 1992).

C. With respect to the demand for a bill of particulars, the Division was requested to furnish a bill with respect to its claim that “the Division obtained information about the purchases made by the corporation during the audit period from the petitioner’s suppliers and estimated petitioner’s taxable sales by marking up such purchases.” The Division responded by stating that the supplier information came from a monthly list of petitioner’s total purchases from Center Candy, Inc., and petitioner’s own records. The Division also provided to petitioner the monthly list of petitioner’s total purchases from Central Candy, Inc., for the period January 1999 through April 2002. This response by the Division provided petitioner with the underlying factual basis as to the information obtained about petitioner’s purchases that was used in the computation of additional sales tax due. In fact, the Division provided petitioner with the actual information which it had obtained from Center Candy, Inc. Therefore, it is determined to be an adequate response to petitioner’s demand for a bill of particulars. In addition, it is noted that the answer makes no mention of invoices, which are the specific documents which petitioner requests.

D. The demand for a bill of particulars seeks the production of documents, including a request for “[a] listing of each and every invoice obtained from petitioner’s suppliers for the subject audit period that was used to estimate Petitioner’s sales, including, but not limited to, the date, and number of each invoice and the dollar value of each invoice.” It is not the function of a bill of particulars to provide evidentiary material (*Frequency Electronics, Inc. v. We’re Associates Co.*, 90 AD2d 822, 456 NYS2d 20). The supplying of evidentiary material is not the task of a bill of particulars, which is supposed to offer a more expansive statement of the pleader’s contentions rather than the evidentiary basis on which the claim is based. Furthermore, the Rules of Practice preclude an administrative law judge from entertaining a motion for prehearing discovery (*see*, 20 NYCRR 3000.5[a]). Accordingly, the Division is not required to produce any further documentation relating to the purchases made by petitioner from Center Candy, Inc.

E. Petitioner’s motion for an order of preclusion is denied.

DATED: Troy, New York
February 2, 2006

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE